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No.

In the
Supreme Court of the United States

E.S.H.,

Petitioner,

v.

K.D. AND S.L.C.,

Respondents.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Eric S. Harner (hereinafter E.S.H. or Father) and Karen Harner (hereinafter Mother) were married, had a daughter, O.H., and separated three years later. Upon separation, Father and Mother enjoyed shared legal custody: Mother enjoyed primary physical custody, and Father exercised partial custody every three out of four weekends per month. Mother met, cohabitated with and eventually married Kent Deeter (hereinafter K.D.). O.H. lived with K.D., a legal stranger, for only two years and three months before her mother died. When Mother died, Father assumed sole legal and physical custody of his daughter, O.H. Although a legal stranger, K.D. petitioned for and was granted shared legal custody and primary physical custody of O.H. over Father's strong and continuous objections. This case presents the following questions:

1. Whether a court violates the Fourteenth Amendment to the United States Constitution when it denies a fit parent his fundamental right to parent his child without first establishing a compelling state interest and then only effectuating that interest by a narrowly tailored means.

2. Whether Pennsylvania's *in loco parentis* doctrine, permitting any legal stranger to seek legal custody of a child, over the parents' objections, violates parents' constitutional right to raise their children which is firmly established under the Fourteenth Amendment's Due Process Clause.

3. Whether the disparity among the states requires this Honorable Court to make a definitive holding that the Fourteenth Amendment's Due Process Clause requires that only a showing that the parent's action or inaction resulting in harm to the child triggers the state's "compelling interest" without which the state may not infringe upon parents' fundamental right to parent their child.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings are the original Defendant, Eric S. Harner (hereafter referred to as E.S.H. or Father), who is the biological father of the child, O.H., and the Petitioner herein. The original Plaintiff, Kent Deeter (hereafter referred to as K.D.), is a third party or legal stranger to the child and the Respondent for this proceeding. Sandra L. Cooney (hereafter referred to as S.L.C.), is O.H.'s maternal grandmother, also a third party or legal stranger, was originally identified as a co-defendant and is the second Respondent for this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

E.S.H. respectfully petitions for a writ of certiorari to review the judgment of Pennsylvania's trial and appellate courts.

OPINIONS BELOW

The memorandum of the Superior Court of Pennsylvania is unpublished and is reproduced at App. A at 1a-24a. The opinion and order of the Court of Common Pleas of Schuylkill County is unpublished and is reproduced at App. B at 25a-132a. The order of the Supreme Court of Pennsylvania is unpublished and is reproduced at App. C at 133a-134a.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on December 21, 2009. The order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal was entered on May 3, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The first section of Amendment XIV to the Constitution of the United States provides:

> § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

I. Factual History

This petition examines the state court's refusal to acknowledge, consider and apply the principles articulated in *Troxel v. Granville*, 530 U.S. 57 (2000) to the present case involving a parent's right to exercise custody and control of his child against a third party, a legal stranger.

Additionally, the case presents this Honorable Court with the opportunity to review whether the application of Pennsylvania's overly broad *in loco parentis* doctrine used against a fit parent, and without a finding of harm, violates the parent's due process rights.

Petitioner, E.S.H., is the father of O.H. Father and Mother were married in 1995 and O.H. was born in 1998. Mother and Father separated in 2001 and were divorced in April, 2004. Father has remained a constant presence in O.H.'s life since her birth. Pursuant to a court-approved custody agreement, Mother enjoyed primary custody while Father had physical custody of O.H. alternating week-ends of the month and every Wednesday evening for two and one-half hours. Mother and Father agreed to modify custody and for several years, in exchange for Wednesday evenings, Father enjoyed custody on three

out of four weekends per month. Father's fitness to parent his child has never been questioned.

Following their divorce, Father remarried in 2004. Mother met K.D. in 2004; she and O.H. started living with K.D. in February, 2005. Mother and K.D. were married in March, 2006. As an ex-spouse, Father was never in a position to object to Mother's remarriage to K.D. or to K.D.'s involvement in O.H.'s life by virtue of Mother's remarriage. Although Father could not object to K.D.'s involvement in his daughter's life, he never consented to K.D.'s assuming parental status and never relinquished parental authority to K.D., a legal stranger. During the marriage, K.D. exercised no legal authority over O.H. and acted in the limited role of a care-giver consistent with his marriage to Mother. He was not the child's father or parent; he was only Mother's husband.

Throughout her adult life, Mother suffered from primary sclerosing cholangitis. In the spring of 2007, Mother became sick with pneumonia, and on May 23, 2007, Mother passed away. Days after Mother's death and funeral, Father assumed sole legal and sole physical custody of O.H., and she went to live with her father, her step-mother and her half-brother. K.D. filed a custody complaint, and the trial court granted K.D. shared legal custody and shared physical custody for the summer. After two months, when the new school year started, the court granted K.D. primary custody, required O.H. to relocate back to K.D.'s home county and vitiated Father's ability and right to care for and raise his child.

Eighteen months and a full custody trial later, the trial court awarded shared legal custody and primary

physical custody to K.D., a legal stranger. E.S.H. always strenuously objected to K.D. seeking *in loco parentis* status and K.D.'s arguments that O.H. would be better cared for by him. Father E.S.H.'s legal custody was divided with K.D., and Father was granted only partial physical custody every second and fourth weekend along with shared holidays. Father appealed to the Superior Court of Pennsylvania, which affirmed the trial court's decision. After the Superior Court denied re-argument, Father submitted a Petition for Allowance of Appeal to Pennsylvania's Supreme Court, which denied review. Father now seeks this Honorable Court's review.

II. Procedural History

On May 30, 2007, K.D., claiming *in loco parentis* status, filed a complaint for custody of O.H. against E.S.H., the natural father. The proceedings and hearings conducted before trial showed that Father was always active and involved in O.H.'s life; always strongly objected to K.D. assuming a parental role in the child's life; and always maintained that no claim or interest which the court attributed to K.D. could supplant his fundamental right, as a fit father, to parent his child.

A. The Court of Common Pleas of Schuylkill County

On April 8, 2009, the Honorable Jacqueline L. Russell entered an Opinion and Final Order of the Court of Common Pleas for Schuylkill County granting shared legal custody of O.H. to K.D. and E.S.H., primary physical custody to K.D. and partial physical custody to E.S.H. The trial court's opinion repeated

K.D.'s findings of facts and conclusions of law and contained little original analysis of controlling law.

In support of its determination that K.D. and S.L.C. had standing to pursue custody, the trial court stated:

> Thus while it is presumed that a child's best interest is served by maintaining the family's privacy and autonomy, that presumption must give way where the child has established strong, psychological bonds with a person who, although not a biological parent, has lived with the child and provided care, nurture, and affection, assuming in the child's eye a stature like that of a parent. Where such a relationship is shown, our courts recognize that the child's best interest requires that the third party be granted standing so as to have the opportunity to litigate fully the issue of whether that relationship should be maintained even over a parent's objections.

Trial court opinion at App. B at 108a.

The trial court's articulated legal standard fails to account for the clear precedent of this Court, which makes clear that the parent's fundamental right cannot be impinged upon without the required compelling interest (i.e., a showing that the parent's actions harmed or will harm the child.) As Justice O'Connor opined, "The Due Process Clause does not permit a state to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel*, 530 U.S. at 72. Like *Troxel*, this case

involves the elevation and expansion of a broadly applied custody doctrine at the expense of a parent's fundamental right to parent his or her child. Just because the trial court believed that it could make a better decision did not entitle it to do so.

The trial court also relied on *Hiller v. Fausey*, 588 Pa. 342, 904 A.2d 875 (Pa. 2006), when it recognized that K.D. and S.L.C., "as third parties, bear a heavy burden to establish a claim to custody which is contrary to the position urged by the parent." App. B, 109a. The trial court continued to quote from that opinion:

> When the judge is hearing a dispute between the parents, or a parent, and a third party, . . . [t]he question still is, what is in the child's best interest? However, the parties do not start out even; the parents have a "prima facie right to custody," which will be forfeited only if "convincing reasons" appear that the child's best interest will be served by an award to the third party.

Trial court opinion at App. B at 110a.

The trial court refused to recognize and apply current controlling jurisprudence, which, since *Troxel*, requires more than granting fit parents a *prima facie* right to custody. Interestingly, the only place the trial court mentioned *Troxel* was in a footnote citing a dissenting opinion to support its proposition that all decisions must be child-centered:

> The Court also finds a comment by United States Supreme Court Justice Stevens in his

> dissent in *Troxel v. Granville*, 530 U.S. 57 (2000) worthy of note. Justice Stevens observed, "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case. . . –the child.

Trial court opinion App. B at 108a, citing *Troxel*, 530 U.S. at 86.

The trial court failed to recognize that this case is not a parent versus parent custody case wherein the trial court must decide the child's best interests between two equally positioned parents. The trial court gave only a polite nod to Father's constitutionally protected fundamental right by applying a minimal *prima facie* presumption to his right to custody.

A parent's fundamental right to care for his or her child may only be abridged by a compelling interest that is narrowly tailored. See e.g. *Reno v. Flores*, 507 U.S. 292 (1993). The trial court granted shared legal custody and primary physical custody to a third party over the continuous objections of a fit parent by purportedly overcoming a substandard parental presumption or a mere *prima facie* right. The trial court not only ignored the parent's fundamental right but, when abridging that right, failed to identify a compelling state interest and neglected to require that such abridgment be narrowly tailored. In so doing, the trial court violated Father E.S.H.'s fundamental rights.

B. The Superior Court of Pennsylvania

The Pennsylvania Superior Court's order sustained K.D.'s *in loco parentis* status and restated the trial court's assertion that "the intent of the custody order [was] to serve [O.H.'s] well-being." (Trial court opinion, App. B, 121a). In this review, the Superior Court weighed the extent of E.S.H.'s involvement and interest in O.H.'s life against the involvement of K.D.—clearly the wrong standard.

The Superior Court merely affirmed the trial court's opinion that "there is no question that a parent has a fundamental right to make decisions about the care, custody and control of his child and that the law provides that the determination about a child made by a fit parent must be given material weight when at issue before a court." Trial court opinion, App. B at 105a. This is only lip-service to the bedrock principle articulated in *Troxel* because the Superior Court, like the trial court, failed to establish the unfitness of the parent prior to abridging his fundamental right. In upholding the trial court's decision, the Superior Court never mentioned *Troxel* or recognized its basic principle that a parent has a fundamental right to care for and raise his child.

Equally troubling is the fact that the Superior Court failed to recognize Father's reliance on *Troxel* by stating, "Father relies primarily on our Supreme Court's decision in *Shepp v. Shepp*, 88 Pa. 691, 906 A.2d 1165 (Pa. 2006), to argue that the court was required to apply a strict scrutiny test and determine if there was a compelling interest to protect the child before infringing upon this right." Superior Court opinion at App. A at 13a. The Superior Court refused

to acknowledge that Father's brief was predicated on his federally protected rights under the United States Constitution and replete with argument based upon *Troxel*, as well as subsequent state cases which clarified and incorporated its holding.

Again, seemingly without independent analysis, the Superior Court adopted the trial court's opinion and conclusions of law when it wrote, "We further decline Father's request to require the third party must prove that a parent is unfit in order to gain custody over a parent." Superior Court opinion at App. A at 12a. The Superior Court used pre-*Troxel* case law to support its misguided decision which rejected a requirement for a showing of harm and completely failed to recognize federal holdings which required harm as a condition precedent to triggering the state's compelling interest.

C. The Supreme Court of Pennsylvania

E.S.H. filed a timely appeal to the Supreme Court of Pennsylvania. By Order dated May 3, 2010, the Supreme Court denied review without comment or written opinion. App. C 133a.

REASONS FOR GRANTING THE PETITION

I. Because Pennsylvania and other states refuse to recognize a parent's fundamental right as articulated in *Troxel v. Granville* and fail to apply a strict scrutiny analysis to that fundamental right, this Court must definitively require a strict scrutiny analysis when parents' fundamental rights to govern their children's care and custody are implicated.

In *Troxel*, this Court stated, "We do not, and need not, define today the precise scope of the parental rights in the visitation context." *Troxel* at 73. Because states are unclear about the level of deference due the parent's fundamental right this Court must definitively articulate the precise scope of the parental due process right in the custody or visitation context.

Troxel clearly announced, "It cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care custody and control of their children." *Id.* at 66. What the *Troxel* Court left for another day was the business of defining precisely the appropriate standard courts must apply before depriving parents of their fundamental right to make decisions concerning the care, custody and control of their children. That day has come.

Recognizing the gravity of a fundamental right, Justice Thomas directed the court down the correct path when in his concurrence he wrote, "The opinions of the plurality, Justice Kennedy, and Justice Souter recognize such a right, but curiously none of them

articulates the appropriate standard. I would apply strict scrutiny to infringements of fundamental rights." *Id.* at 80.

II. Pennsylvania's common law *in loco parentis* doctrine has evolved into an overly broad doctrine that permits any person who believes he or she has developed a relationship with a child to seek custody of the child against the fit parent.

The *in loco parentis* doctrine developed over time as a narrow exception to the principle that only parents or the state had standing to pursue custody of a child. The doctrine requires exacting proof that the third party, the legal stranger, acted as a parent in place of the parent and with the consent of the parent.

Unfortunately, over time, through well intended, albeit misguided court decisions, the exception swallowed the rule. The once narrow legal doctrine has changed into a broadly applied legal fiction which permits any person at any time to petition the court and seek custody of a child even if the fit parent objects. This Honorable Court needs to act now to halt continued constitutional violations and rectify the immediate effects of the present wrongful decision.

III. Because there is discord among the state courts regarding whether a showing of harm is required to interfere with the parent/child relationship, this Court must intervene and require a uniform protection of this fundamental right.

Because numerous state courts refuse to recognize this Court's decisions that parents' enjoy a fundamental right to raise their children which can be impinged only by showing parental unfitness or harm to the child, this Honorable Court must address the issue and require a uniform treatment of fundamental rights.

The Pennsylvania courts in this instant matter and other states that simply provide parents with a *prima facie* right to custody of their children without any showing of harm completely undermine the principles articulated in *Troxel* and the century of precedent upon which it was built.

ARGUMENT

I. PENNSYLVANIA AND OTHER STATES OFFEND THE CONSTITUTION BY DISREGARDING CONTROLLING FEDERAL PRECEDENT AND BY FAILING TO RECOGNIZE THAT PARENTS' FUNDAMENTAL RIGHT TO PARENT THEIR CHILD REQUIRES STRICT SCRUTINY ANALYSIS.

This Court has firmly established that a parent has a fundamental right to parent his or her child and any infringement of that right must be narrowly tailored to

serve a compelling interest. The Pennsylvania trial and appellate courts refused to follow controlling United States precedent by failing to recognize that Father's right to parent his child is fundamental. The Pennsylvania courts also failed to apply the proper standard of review required to protect Father's fundamental right. Additionally, Pennsylvania is not alone; many states refuse to follow precedent and recognize fundamental parental rights. Therefore, this court must intervene.

A. Pennsylvania courts ignored *Troxel* and failed to recognize that parents enjoy a fundamental right to govern the care, custody and control of their children.

This Court has long recognized a fit parent's fundamental right to make decisions concerning his or her child's upbringing. It is "perhaps the oldest of the fundamental liberty interests." *Troxel v. Granville*, 530 U.S. at 65 (2000) (plurality opinion).

This Court has also explained that, because "[t]he child is not the mere creature of the State," *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *see also In Interest of La Rue*, 244 Pa. Super. 218, 224 (1976), "[i]t is cardinal that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce*, 268 U.S. at 535). Cases such as *Myers*,[1]

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[1] *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Pierce,[2] *Skinner*,[3] *Prince*,[4] *Yoder*,[5] and others demonstrate this Court's longstanding deference to the parents' fundamental right to rear their children without substantial and unnecessary interference from the state.

Although the plurality in *Troxel* chose not to "define today the precise scope of the parental due process right in the visitation context," Justice Thomas quite succinctly opined that "strict scrutiny should apply to infringements of fundamental rights." *Troxel* at 80. Additionally, in *Reno v. Flores*, the Supreme Court recognized that a long line of cases have interpreted the "Fifth and Fourteenth Amendments' guarantee of 'due process of law' to include a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests **at all**, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (emphasis in original).

Unfortunately, even though this Court has provided adequate guidance and recognized the proper analysis for infringements of fundamental rights, the trial and appellate courts in this case refused to apply

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[2] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

[3] *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

[4] *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

[5] *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972).

Troxel and other authority when they afforded Father a mere presumption of custody.

Clearly, *Troxel* has cemented the principle that parents have a fundamental liberty interest, grounded in the Due Process Clause of the Fourteenth Amendment, in directing the care, custody and control of their children. In the present case, the Pennsylvania courts refused to acknowledge this binding authority and failed to recognize Father's fundamental right to parent his child. In doing so, the Pennsylvania courts violated Father's clearly established right guaranteed by the Fourteenth Amendment's Due Process Clause.

B. Pennsylvania courts applied a much lower standard of review than is required to protect Father's fundamental right to parent his children.

While Justice Thomas's concurrence in *Troxel* stated that strict scrutiny review should be applied to infringements of parents' fundamental rights to parent their children (530 U.S. at 67) and while the Pennsylvania Supreme Court has held that strict scrutiny applies to infringements of fundamental rights (588 Pa at 358) the Superior Court stated that "the best interest of the child standard in custody cases gives deference to the parents' prima facie right to custody over a third party and accords such right more weight than a third party's claim." Superior Court Opinion at App. A at 14a. Simply put, considering recent United States and Pennsylvania Supreme Court decisions, the Pennsylvania Superior Court used the wrong standard.

While this Court has not yet specifically held that strict scrutiny applies to infringements on parents' fundamental right to raise their children, it has clearly applied strict scrutiny to other fundamental rights. Additionally, even though *Reno v. Flores*, 507 U.S. 292 (1993) did not use the specific phrase "strict scrutiny," the Court accepted the applicable standard as required to test the government's infringement of the fundamental right.

However, many state courts, and specifically Pennsylvania in this case, still employ a much lower "presumption of custody" standard. The Pennsylvania Superior Court relied on pre-*Troxel* case law when it stated,

> The [Superior Court] has consistently held [that] . . . "[p]arenthood alone is insufficient to defeat a custody claim raised by a non-parent." The most important issues in a custody dispute are the child's physical, intellectual, moral, and spiritual well-being. The fact that the best interest of the child is the paramount consideration is . . . beyond peradventure. . . . Indeed, even the rights of the parents are subordinate to the child's best interest.

Superior Court opinion App. A at 14a.

Pennsylvania's violation of Father's fundamental right is further evidenced by the Superior Court's statement that the "best interest standard gives deference to parents' *prima facie* right to custody over a third party and accords such right more weight than a third party's claim." Superior Court opinion App. A at 14a. The Superior Court's reliance on the "deference

to parents' *prima facie* right to custody over third parties" improperly employs a much lower standard of protection than is required by *Troxel*. *See* Superior Court Opinion, App. A at 14a. A parent cannot enjoy a fundamental right that is only afforded a *prima facie* deference. Such token protection of a fundamental right is tantamount to having no fundamental right at all.

Because the lower courts did not consider or apply the principles articulated in *Reno* and *Troxel*, this Court should reverse their decisions and reiterate that fit parents enjoy a fundamental right to the care, custody and control of their child, and all courts must apply a standard of strict scrutiny analysis to any government infringement of that fundamental right.

C. Pennsylvania is one of many states that ignore *Troxel* and other United States Supreme Court precedent which protect parents' fundamental rights against attacks by third parties.

A growing number of states, including Arizona, Arkansas, Colorado, Kentucky, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Pennsylvania, Rhode Island, Utah, West Virginia and Wisconsin, grant custody to third parties over the objection of the child's fit parent. Relying on various theories, these states have circumvented *Troxel's* guarantee of a fit parent's right to family autonomy and privacy as displayed in the following cases: *Riepe v. Riepe*, 91 P.3d 312, 318 (Ariz. Ct. App. 2004) (A third party to a child was allowed to obtain visitation despite the fit parent's objections. The majority opinion did not apply let alone mention *Troxel* or the

mandatory presumption that the fit legal parent had acted in the child's best interest. As the dissent explained, the majority's analysis contained "serious constitutional problems."); *Robinson v. Ford-Robinson*, 2005 WL 1041158 (Ark. 2005) (An Arkansas fit biological father objected to his ex-wife, not the mother to the child, obtaining visitation. The Arkansas Supreme Court held that the *Troxel* presumption that a fit legal parent acts in the child's best interest did not apply and that the rights of the step-parent were equal to the fit biological parent under the *in loco parentis* doctrine.); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1151 (Me. 2004) (There was no mention of *Troxel* when the court explained that once a court determines the non-parent qualifies as a *de facto* parent, the court is free to award parental rights and responsibilities over the objection of the biological parent.); *Rideout v. Riendeau*, 761 A.2d 291, 294, 297, 302 (Me. 2000) (Emotional bonds between grandparents and a child were considered to provide "a compelling basis for the state's intervention into an intact family with fit parents."); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. App. 2000) (Without any consideration of the mandates of *Troxel* to presume that the mother's decision was in the child's best interest or any "special weight" given to the mother's objection, the court granted the paramour equal status as parent.); *Gestl v. Frederick*, 754 A.2d 1087 (Md. Ct. Spec. App. 2000) (The Court found *Troxel* provides some protection to fit parents, but does not prevent third-parties from obtaining custodial rights); *T.B. v. L.R.M.*, 786 A.2d 913, 917 (Pa. 2001) (The Court found the rights of non-parents may be elevated to the same level as a fit legal parent.); *Jones v. Jones*, 884 A.2d 915 (Pa. Super. Ct. 2005) (Without mentioning *Troxel*, the Court found a non-parent may obtain custody by proving with clear and

convincing evidence that the change is in the best interest of the child.); and *Rubano v. DiCenzo*, 759 A.2d 959, 976 (R.I. 2000) (The existence of a relationship between the child and the third party was found to justify the state's infringement on the parent's due process rights.)

Too many states disregard the fit parents' constitutional right to parent his child in favor of accommodating third parties. Some suggest that a *de facto* parent automatically stands equal to a biological parent while others explain that a non-parent's emotional attachment to a child provides the compelling interest necessary to overcome the biological parents' right to family autonomy and privacy guaranteed by the Constitution. Whatever the reason, these states violate parents' fundamental right to direct their child's care, and this court must act now to prevent further deprivations.

II. PENNSYLVANIA'S *IN LOCO PARENTIS* DOCTRINE VIOLATED FATHER'S FUNDAMENTAL RIGHT TO PARENT HIS CHILD

Pennsylvania's progressive expansion of the common law *in loco parentis* doctrine violates parents' constitutional rights. In *Troxel*, the United States Supreme Court upheld the striking of Washington's overly broad grandparent visitation statute that permitted a trial court to grant visitation to any person at any time based solely on the trial court's perception of the child's best interest. This Court found the statute constitutionally offensive because it violated the parent's fundamental right guaranteed by the Fourteenth Amendment to direct the care, custody

and control of his child. Presently, Pennsylvania's *in loco parentis* doctrine suffers from the same constitutional infirmity. Without respect for the parent's fundamental right it permits a trial court to grant custody to any person claiming a relationship with the child. This can happen even if the third party has no biological ties to the child and even if the fit parent strongly objects to the third party's interference with the parent/child relationship. Frequently, as in the present case, the trial court exercises unfettered discretion and grants any third party, relative to the child or not, custody of the child by substituting its perception of the child's best interest for the parent's determination of the child's best interest.

Pennsylvania's *in loco parentis* doctrine used to protect parents' constitutional rights. Such is no longer the case. The new, expanded *in loco parentis* doctrine disregards set constitutional protections. An analysis of the pertinent cases shows that historically, to seek custody of a child, a third party needed either statutory standing or stood *in loco parentis* by assuming parental status and responsibilities with the consent of the parent. *See Kramer v. McMahon*, 640 A.2d 926 (Pa. Super. Ct. 1994) (The core concept was that persons other than biological parents are third parties for purposes of custody disputes.); *Morgan v. Wiser*, 923 A.2d 1183, 1187 (Pa. Super. Ct. 2007) (In order to protect the family and the parent/child relationship, this doctrine firmly established that "a third party cannot place himself *in loco parentis* in defiance of the parents' wishes and the parent/child relationship."); and *B.A. & A.A. v. E.E.*, 559 Pa. 545, 550-551, 741 A.2d 1227, 1230, (1999) (citing *Gradwell v. Strausser*, 610 A.2d 999, 1003 (Pa. Super. Ct. 1992)) (Third parties could only assume parental status and

responsibilities "as a result of the participation and acquiescence of the parents." *J.F. v. D.B.*, 897 A.2d 1261, 1227 (Pa. Super. Ct. 2006)).

Father and Mother decided to start a family and have a baby together. K.D. never figured into that equation; he was, and remains, a third party to the parent/child relationship. Father never authorized K.D. to play an active role as a parent to O.H. Father never consented or acquiesced to K.D. performing parental duties, he never encouraged K.D. to act in a parental role, he did not introduce K.D. into the child's life and he never permitted K.D. to direct the child's upbringing. K.D. clearly assumed parental status against the wishes of the remaining parent.

K.D. never acted in a fashion other than, perhaps, a frequent caregiver. By his own admission, K.D. was never given permission to assume parental status or discharge parental duties (R. 00841-43). While Mother was alive, she, not K.D., exercised parental authority over O.H. (R. 00845-46). Mother was primarily responsible for the child's medical care. Further, Father remained a constant presence in O.H.'s life. Mother and Father, not K.D., oversaw the child's educational progress (R. 00846, 01401). While it may be true that K.D. did some activities with O.H. such as reading or occasionally helping with homework (R. 00845), that level of involvement does not equate to assuming parental status.

After Mother died, the trial court's Interim Order thrust K.D. into the parental role (R. 00449-57). Father demonstrated his strong objection by filing an Emergency Petition for Special Relief (R. 00458-65). The record clearly establishes that K.D. placed himself

in loco parentis in direct defiance of E.S.H.'s wishes and to the detriment of the parent/child relationship (R. 00846, 00118-20, 00841-43).

Because the traditional protections afforded parents' constitutional rights are no longer applied, the Pennsylvania courts violated Father's constitutional rights by creating a new and overly broad *in loco parentis* doctrine that allows any person at any time to take the parent's place without providing the necessary constitutional safeguards.

Without Pennsylvania's radical departure from the controlling principle that parents enjoy a fundamental right to parent their children, K.D. would not even have been allowed to adopt O.H. because the fit parent never relinquished his fundamental right to care for his child. In essence, Pennsylvania's refusal to recognize father's fundamental rights gave K.D. squatter's rights to another man's child. This cannot stand.

Had the constitutional protections contained in this intentionally narrow legal doctrine been properly applied, the lower courts would have determined that K.D. could not and did not establish *in loco parentis* standing prior to the custody action. However, because the courts expanded this narrow legal doctrine and rejected federal guidance regarding parents' fundamental rights, the immediate result was a decision that violates a fit parent's fundamental right to parent his child.

Such expansion invites bizarre consequences. If a parent's paramour can so easily attain *in loco parentis* status over the second parent's objections, no parent's

fundamental right is secure. Because many parents often cohabitate with multiple people throughout their lives, it is foreseeable that every paramour with whom a parent lives or introduces into the child's life, even over the other parent's objections, would establish *in loco parentis* status and stand equal with the parents for custody purposes. The argument that a court could determine whether such an expanded number of "parents" is in the child's best interest conveniently ignores the primary issue - the "child is not the mere creature of the State," *Pierce*, 268 U.S. 510, 535 (1925), but has been entrusted to the parent who provided for and raised the child in ways the state cannot and should not.

Permitting third parties with whom the child may have a relationship to seek custody of the child undermines and dilutes the parent's rights. The trial court's expansion of the *in loco parentis* doctrine is a violation of the fit parent's fundamental right to parent his child just as the overly broad Washington State statute violated Granville's fundamental rights. Therefore, Father respectfully requests that this Court grant review, and upon review, reverse the decisions of the lower courts and restore the strict parameters of the *in loco parentis* doctrine.

III. UNIFORM APPLICATION OF THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE REQUIRES THAT BEFORE THE STATE'S COMPELLING INTEREST IS TRIGGERED, THE STATE MUST ESTABLISH THAT THE PARENT HARMED THE CHILD

Through the years, this Court has clearly articulated that parents enjoy a fundamental right to the care, custody and control of their children and a showing of harm to the child is needed to trigger the state's compelling interest before curtailing that fundamental right. Whether in the grandparent visitation context or a non-grandparent third party custody case, confusion abounds because parents' established fundamental right presumably requires strict scrutiny protection as do other fundamental rights but *Troxel* provides no guidance. *Troxel* passed on providing a standard for protecting this right.

Because the decision from Pennsylvania's appellate court is out of step with controlling federal authority and because confusion and disparity exists among the various states, uniform application of the Fourteenth Amendment's Due Process Clause requires this Court to declare that before the state's compelling interest is triggered, the parent's actions or inaction must be shown to result in harm to the child.

A. Pennsylvania courts are out of step with constitutional law which requires a determination that the parent harmed the child before triggering the state's compelling interest.

More than eighty-five years ago, in *Meyer v. Nebraska*, 262 U.S. 390 (1923) this Court ruled that the Due Process Clause protects parents' fundamental right to raise their children and control their children's education. *Id.* at 399. This principle has been affirmed in numerous contexts. The state can interfere with this fundamental right only "if it appears that the parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

Since *Yoder*, this Court has continued to hold that without showing harm, third parties are not entitled to custody over parents. For instance, this Court has held that a child cannot be removed from a parent's home to be adopted by another as long as the parents are adequately providing for the child. "We have little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). Federal law does not authorize "unrelated persons to retain custody of a child whose parents have not been found to be unfit," *Deboer v. Deboer*, 509 U.S. 1301, 1302 (1993). Additionally, "'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody: so long as certain minimum requirements of

child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves." *Reno v. Flores*, 507 U.S. 292, 304 (1993) citing *R.C.N.* v. *State*, 141 Ga. App. 490, 491, 233 S.E.2d 866, 867 (1977).

Despite the wealth of federal guidance, the Pennsylvania courts fail to consistently follow the law and require a showing of harm before interfering with a parent's fundamental right. In the instant matter neither the trial nor the appellate court applied the constitutional requirements to Father's fundamental right to direct his child's upbringing. In its ruling, the Pennsylvania appellate court stated:

> We further decline Father's request to require that a third party must prove that a parent is unfit in order to gain custody over a parent. As set forth above, the *in loco parentis* basis for standing holds no such requirement. Moreover, our Supreme Court has consistently rejected this argument with respect to custody determination.

Superior Court opinion, App. A at 12a.

Because this Court has seen fit to protect parents' fundamental rights to parent the child by requiring a demonstration of harm, the Pennsylvania courts are out of step with required constitutional protections.

The progression of applicable case law establishes that while the state has a compelling interest in protecting the well-being of a child, that compelling interest is not triggered unless there is some

demonstrable harm that will befall the child if the court does not interfere with the parent's fundamental right, and then, courts may interfere only in the least restive way.

Troxel and the cases upon which its authority was based unquestionably established a parent's fundamental right. Because the Pennsylvania courts failed to follow federal precedent, the decision cannot stand.

B. Because discord exists among the states regarding whether a showing of harm is required to interfere with the parent/child relationship, this Court must require a uniform treatment of fundamental rights.

As noted above, several federal cases require that in disputes between a parent and a third party, before interfering with the parent/child relationship, harm to the child must be shown. However, various state courts routinely disregard this principle and employ a simple "best interest" analysis, treating parents and non-parents alike.

Uniformity and equal treatment require that this Court intervene. The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, 262 U.S. at 399 (1923), the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, 316 U.S. at 541 (1942), and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring), *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The "Due Process Clause of the Fifth Amendment guarantees every person the equal

protection of the law 'which is essentially a direction that all persons similarly situated should be treated alike.'" *Jankowski-Burczyk v. INS*, 291 F.3d 172, 176 (2d Cir. Conn. 2002), citing *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)). Given the substantial protections afforded parents' fundamental rights, equal protection demands uniform application of law regarding the triggering of the state's compelling interest. The level of protection given a fit parent's fundamental right to control or care for his child cannot depend upon the whim of a trial court that refuses to follow federal precedent.

Many states do not require parental harm to the child before interfering with the parent/child relationship. See for instance: *Vibbert v. Vibbert*, 144 S.W.3d 292 (Ky. App. Ct. 2004) (The Appeals Court of Kentucky discarded their standard for showing harm in non-parental visitation context calling the standard "unnecessarily strict and unworkable."); *Downs v. Scheffler*, 206 Ariz. 496, 502 (Ariz. 2004) ("It is inappropriate to defer an examination of the child's best interests until parental inappropriateness is established."); *Harrold v. Collier*, 107 Ohio St. 3d 44, 2005 Ohio 5334, 836 N.E.2d 1165 (2005) (Ohio considers the child's best interests as the paramount concern and for its determination will consider fifteen factors, only one of which is whether the parent ever abused the child or caused harm to another family member who is a party to the proceedings. Ohio believes this approach does not minimize the "special weight" due to the wishes of a parent.) See also *State ex rel. Reeves v. O'Malley*, 2001 Ohio App. LEXIS 2530 (Ohio Ct. App., Cuyahoga County June 1, 2001) (citing

Boyer v. Boyer, 46 Ohio St. 2d 83 (OH 1976) (Ohio held in "determining who shall have the care, custody and control of a child under eighteen years of age, even though the child's parents are not found to be unfit or unsuitable, the court may commit the child to a relative when the court finds that custody to neither parent is in the best interest of the child."); *Brandon L. v. Moats*, 209 W. Va 752, 551 S.E.2d 674 (W. Va. 2001) (West Virginia does not require a showing of unfitness before interfering with the parent/child relationship, finding that due process concerns were satisfied by statutory requirements that the court consider the child's best interests and minimize interference in the parent/child relationship.); *Zeman v. Stanford*, 789 So. 2d 798, 804 (Miss. 2001) (There is no requirement of finding parental harm to the child before grandparents may obtain visitation, but factors in the court's best interest approach include harm to the child if visitation with grandparents is denied.); and *Roger D.H. v. Virginia O.* (*In re Roger D.H.*), 2002 WI App. 35, 12 (Wis. Ct. App. 2002) (Wisconsin law (Stat. § 767.245) "does not require a showing of parental unfitness before a court may override a parent's decision regarding grandparent visitation, nor do we find any case law from this state holding as much. There is no suggestion in *Troxel* that a court may only interfere with a parent's decision regarding visitation if the parent is shown to be unfit.")

In contrast, many other states' highest courts have followed federal precedent and declined to award custody to third party over the parent absent a showing of parental unfitness or harm to the child. This is because many states still respect controlling authority and the principle that the best interests of the child is found within the custody and care of the

parent.[6] See e.g.: *Askew v. Donoho*, 993 S.W.2d 1 (Tenn. 1999) (The "magnitude of a parent's constitutional right to rear and have custody of his or her children would necessitate a clear finding of substantial harm."); *Hawk v. Hawk*, 855 S.W.2d 573, 580 (Tenn. 1993) (The Court required "an initial showing of harm . . . before the state may intervene to determine the 'best interests of the child.'"); *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769, at 774 (Ga. 1995) ("[T]he 'best interest of the child' standard does not come into play to permit interference with the custody and control of the child, over parental objection, unless and until there is a showing of harm to the child."), *cert. denied*, 516 U.S. 942, 116 S. Ct. 377, 133 L. Ed. 2d 301 (1995); *In re Herbst*, 1998 OK 100, 971 P.2d 395, 399 (Okla. 1998) ("To reach the issue of a child's best interests, there must be a requisite showing of harm, or threat of harm. . . . Absent a showing of harm (or threat thereof), it is not for the state to choose which associations a family must maintain and which the family is permitted to abandon."); and *Williams v. Williams*, 256 Va. 19, 501 S.E.2d 417, 418 (Va. 1998) ("For the constitutional requirement to be satisfied, before visitation can be ordered over the objection of the child's parents, a court must find an actual harm to the child's health or welfare without such visitation. A court reaches consideration of the 'best interests' standard in determining visitation only after it finds harm if visitation is not ordered.").

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[6] See Appendix D for a list of states, with citations and pertinent language.

Several states have observed and noted that *Troxel's* refusal to require a showing of harm causes confusion. "Moreover, after *Troxel* it appears that federal constitutional law in this area is now not as predictable as it was before *Troxel*." *DeRose v. DeRose*, 469 Mich. 320, 334 (Mich. 2003), or, as stated by New Jersey:

> Courts across the country have wrestled with the issue of grandparent visitation both before and after *Troxel*. In general, they have engaged in one of two modes of analysis: (1) interpreting the statutes to require satisfaction of a harm standard in order to overcome the presumption in favor of a fit parent's decision or (2) avoiding the articulation of any standard at all and analyzing the statutes on a case-by-case basis. *Troxel* implied that either approach would be acceptable.

Moriarty v. Bradt, 177 N.J. 84, at 109 (N.J. 2003)

Because there is disagreement among the states regarding when and under what circumstances a state or court may interfere with the parent's fundamental right to parent a child, this Court must definitively articulate, in keeping with its earlier decisions, that the state's compelling interest in protecting the welfare of the child is not triggered unless there is some showing that the parent harmed or will harm the child. This standard alone, equally applicable in all states at all times, will preserve the longstanding fundamental liberty interest that this Court has so consistently protected.

CONCLUSION

This Honorable Court should grant Father's Petition for Writ of Certiorari because the evidence is clear that Pennsylvania and other states do not implement adequate protections for a parent's fundamental right to parent his or her child. Pennsylvania's overly broad *in loco parentis* doctrine deprives parents of their rightful ability to care for and control their children. Further, there is disparity among the states regarding the requirement for a showing of harm as a condition precedent for triggering the state's compelling interest. For these reasons, this Honorable Court must summarily reverse the decision of the Pennsylvania courts and must unambiguously hold that strict scrutiny must be applied to deprivations of parents' fundamental rights and that harm to the child is a condition precedent to triggering the state's compelling interest before interfering with the parent/child relationship. Only in this way will parents' fundamental right to raise and care for their children be protected.

Respectfully submitted,

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